NO. . . . . .

In the Supreme Court of the United States

OCTOBER TERM, 1941

A. W. STICKLE & COMPANY, a Corporation,
Petitioner,

VERSUS

INTERSTATE COMMERCE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The district court filed two opinions written by District Judge EUGENE RICE. The first one dealt with the denial of petitioner's motion to dismiss for want of proper service and for want of proper venue. The decision was entered on February 6, 1941, and is reported in 36 Fed. Sup. 782. The Circuit Court affirmed this ruling, and no review is sought here on this feature.

The second opinion of the district court, which is on the merits of the case, is dated September 12, 1941, and reported in 41 Fed. Sup. 268.

The Circuit Court of Appeals filed one opinion (R. 165), written by Judge PHILLIPS, Judge HUXMAN, dissenting. The opinion is not yet published.

JURISDICTION

Petitioner seeks a review by certiorari of the judgment of the United States Circuit Court of Appeals for the Tenth Circuit of March 18, 1942, petition for rehearing denied June 5, 1942, under the provisions of Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. 347 (a)).

STATEMENT OF THE CASE

Although additional facts will be needed by the Court in consideration of the case upon the merits, if jurisdiction is assumed, we believe that for the purposes of this petition the essential facts are stated in the petition, and for the sake of brevity, we will not repeat them here.

SPECIFICATIONS OF ERROR

(1) The Circuit Court of Appeals erred in holding that the operations of petitioner were not those of a private carrier under the Act, where petitioner transported only its own goods "for the purpose of sale," and in furtherance of a "commercial enterprise," even though the sale price of the property transported included a charge for transportation greater at points more distant from orgin than those at nearer points.

(2) The Circuit Court of Appeals erred in not holding the Act to be unconstitutional with respect to the definition of a private carrier as being in violation of the Due Process Clause, under the construction placed by the Court thereon.

SUMMARY OF THE ARGUMENT

Point I.

This is the first case involving the construction of the definitions of the classes of motor carriers classified by the Act, and the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

Point II.

The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court, because it has construed the Act in such a way as to convert a private carrier into a carrier for hire, which would make the Act unconstitutional in that respect as being in violation of the Due Process Clause.

ARGUMENT

Point I.

This is the first case involving the construction of the definitions of the classes of motor carriers classified by the Act, and the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

There has not heretofore been presented to this Court nor any other Circuit Court for determination the important matter of the construction of the definitions of the various classes of motor carriers governed by the Act. There can be no doubt that the issues here make this a case of first impression.

The grave importance of the questions involved becomes apparent when one considers the tremendous part played in the national economy by Part I of the Interstate Commerce Act governing railroads. With the development of the motor carrier industry, Part II of the Interstate Commerce Act is now taking a like place.

No single feature of the Act could have greater significance or importance than the classification of the carriers which are subject to the Act, and the resulting determination of which category of regulations will govern a particular carrier.[3]

The decision of the questions in this case will fix the measure for operations of carriers in the determination of whether such are those of a carrier for hire which must have a certificate of convenience and necessity, file tariffs and meet other rigid requirements as a prerequisite to doing

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3. In an enlightening and exhaustive article in the November, 1941, issue, Volume 9, No. 2, page 119 of the I. C. C. Practitioners' Journal, on the subject of "Common, Contract, and Private Motor Carriers Defined and Distinguished," by WARREN H. WAGNER, Editor-in-Chief, it is stated:

"The Motor Carrier Act, 1935, and as amended, divides the motor carriers subject to regulation by the Interstate Commerce Commission into common, contract and private. The regulations of those carriers vary in degree. The most stringent regulations apply to the former, *i. e.*, the common carrier; and the least rigid to the latter, the private motor carrier. Because of that, the question of whether a given motor carrier falls within one or the other class often becomes highly important."

business; or whether the operations come within the private carrier category with the privilege of operating as a matter of right without permission from the Interstate Commerce Commission and subject only to safety regulations.

Directly and probably mortally affected by the conclusion reached in the majority opinion of the Court below are those individuals dealing in bulky products and conducting their own transportation operations. It is common knowledge that the expense of transportation makes up a large part of the sale price of lumber, coal and other goods of a bulky, low-value nature. It is impossible for one to charge a uniform price for such goods at all points in any appreciable area, regardless of the distance transported. One could not meet competition and operate at a profit.

The Circuit Court decision will therefore compel such individuals to discontinue hauling their goods in their own trucks and force them to handle the transportation necessities of their business through the services of carriers for hire.

The construction placed upon the Act by the Majority opinion of the court below is erroneous because the words "for compensation" used in the definitions of the classes of carriers in the Act are synonymous with "for hire." But the Circuit Court gives the phrase a much broader scope in holding that the making of a charge for transportation, commensurate with the distance of the haul, included in the sale price, amounts to transportation "for compensation." Such holding is not in accord with the intent of

Congress as expressed in the Act, nor the construction thereof by the Interstate Commerce Commission.

Such construction renders entirely useless the definition of a private carrier contained in the Act, because the same result would be reached if the definition had been wholly omitted. This is inconsistent with the fundamental canons of construction that every part of a statute or document is to be given effect, if possible.

Point II.

The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court, because it has construed the Act in such a way as to convert a private carrier into a carrier for hire, which would make the Act unconstitutional in that respect as being in violation of the Due Process Clause.

In order to clarify our position at the outset in connection with this point, it is not petitioner's primary contention that the Act is unconstitutional. On the contrary, petitioner asserts that if the definitions of carriers are properly construed and in conformity with the intent of Congress, there would be no collision between its provisions and the constitutional mandates.[4]

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4. It is presumed that Congress framed the Motor Carrier Act in the light of its lack of power to transmute a private carrier into a carrier for hire by legislative action. *Craig Contract Carrier Application*, 28 M. C. C. 629, 631; *Common, Contract and Private Carriers Defined and Distinguished by Warren H. Wagner*, I. C. C. Practititioners' Journal, Volume 9, No. 2 Page 123 (November, 1941).

But, if this assertion is incorrect and the Circuit Court has properly interpreted the classification of carriers under the terms of the statute and as intended by Congress, then petitioner urges that such classification impinges upon the property rights of petitioner and others similarly situated, in violation of the Due Process Clause of the Fifth Amendment to the Federal Constitution.

It has been held by this Court that State Legislatures are powerless to transmute an individual from the class of a private carrier into that of a public carrier for hire by a legislative fiat, in virtue of the limitations in the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

Michigan Public Utilities Commission v. *Duke* (1925), 266 U. S. 570, 69 L. ed. 445, 45 S. Ct. 191, 36 A. L. R. 1105.

Frost & Frost Trucking Company v. *Railroad Commission* (1926), 271 U. S. 583, 70 L. ed. 1101, 46 S. Ct. 605, 47 A. L. R. 457.

Smith v. *Cahoon* (1921), 283 U. S. 553, 75 L. ed. 1264, 51 S. Ct. 582.

If such legislative action by states is unconstitutional because in violation of the Fourteenth Amendment, then federal legislation with the same vice is vitiated by the Fifth Amendment.

There is little question that the rights of petitioner and others similarly situated are seriously affected by the decision below. We urge that the construction of the definitions of carriers in the Act placed thereon by the

Circuit Court does transform an operation which is in reality that of a private carrier into that of a carrier for hire, the effect of which is to force petitioner and others like it entirely out of the business which it is conducting.

Petitioner cannot conduct its lumber business as a carrier for hire, either as a common carrier as found by the trial court to be the nature of its operation, nor as a contract carrier as determined by the Circuit Court. If petitioner is a common carrier, it cannot make a profit from dealing in lumber and taking advantage of market conditions, salesmanship and the other factors of commercial enterprise, because it can only charge under the law the amount of its tariff rates on file; and furthermore, it cannot select its customers but must haul for all comers indiscriminately.

It could not operate the business for which it is chartered—that of a wholesale lumber dealer—as a contract carrier because it can only charge the amount of its minimum rate schedules filed with the Commission as required by body under the Act. If petitioner purchased lumber at the mill at a certain price, its sale price must always be the price which it paid plus the rate on file with the Commission. Then, too, petitioner could not be a contract carrier because it could not contract with itself. Furthermore, it would not be feasible, because every transaction is an individual sale and it would be impossible to comply with the requirement of having contracts on file with the Commission as required by the Act as implemented by the

Commission's regulations,[5] and if it could, its trade secrets would be given away to such an extent it could not meet competition.

CONCLUSION

The Court has construed various features of the Act, mostly on appeals from Three-Judge decisions, though on occasion by certiorari (*McDonald* v. *Thompson*, 305 U. S. 263, 83 L. ed. 164) but neither it nor any Circuit Court has heretofore had presented to it the important question here involved the construction of probably the most vital single feature of the Act, the definitions of the classes of carriers a carrier falls determines the regulations to which it is subject, which vary greatly in stringency. Important because of its widespread effect throughout the Nation. Important because it involves constitutional rights.

The petition ought to be granted.

Respectfully submitted,

JOHN B. DUDLEY,
DUKE DUVALL,

Counsel for Petitioner.

July, 1942.

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5. *Ex parte* No. MC-9, Filing of Contracts by Contract Carriers, 2 M. C. C. 55.

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 216

A. W. STICKLE & COMPANY, A CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION

The respondent, the Interstate Commerce Commission, in response to the petition for writ of certiorari, concedes the reasons advanced therefor which are shown as Reasons (1) and (3) of the petition, and upon the basis of such reasons (1) and (3) offers no objection to the granting of the petition. *Atlantic Coast Line Railroad Co.* v. *Powe, Administrator*, 283 U. S. 401, 403, 404.

However, the respondent desires to state that, while it insists that the decision (R. 174) of the

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Circuit Court of Appeals, holding petitioner to have engaged in the transportation of lumber as an interstate motor carrier subject to the provisions of Part II of the Interstate Commerce Act, is correct, it believes that it should express its view that the said Court erred in holding (R. 174) that such operations of petitioner were those of a contract carrier under section 203 (a) (15) of the Act, instead of those of a common carrier under section 203 (a) (14) of the Act, as held by the District Court (R. 94).

Respectfully submitted.

DANIEL W. KNOWLTON,
Chief Counsel.

ALLEN CRENSHAW,
FRANCIS A. SILVER,
Attorneys,
Interstate Commerce Commission.

The Solicitor General authorizes the filing of the foregoing memorandum expressing the views of the Interstate Commerce Commission, which has been prepared by counsel for the Commission.

AUGUST 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942